STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 30, 2006
v	No. 264229 Wayne Circuit Court
LAMMARR LEE HANES, Defendant-Appellant.	LC No. 05-003686-01

Before: Wilder, P.J., and Kelly and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of first-degree felony murder, MCL 750.316(1)(b), based on the underlying felony of first-degree home invasion, MCL 750.110a(2). Defendant was sentenced to a term of life imprisonment without the possibility of parole for his conviction. We affirm defendant's conviction and sentence.

Defendant's conviction arises from an incident that occurred at 2936 Roosevelt in Hamtramck on June 16, 2004. Ann Mercik, the 85-year-old victim, lived in a two-story single family home at that address for more than 25 years. Michael Pokoj had lived a few houses down from the victim and would often help her with various errands, repairs around the house and grocery shopping. There were two main entrances to the victim's house. The back door led to the laundry room, which connected to the kitchen and the dining room. One bedroom was immediately off the kitchen, and a second was toward the front of the house near the front door. Both the front and back entrances had metal screen doors that were "always" locked from the inside. In addition, the front door was secured with a "hotel style bar lock," and the back door had a security chain.

Defendant lived 10 to 15 houses east of the victim in the bottom-floor apartment of a three-family residence at 3038 Roosevelt. Pokoj had seen defendant walk through the neighborhood "every other day." Further, he had seen defendant "shoveling snow" and helping the victim with chores on her front porch on several different occasions. When the victim gave Pokoj money to pay for groceries, he noted that she kept her cash underneath an ashtray that was on top of the dining room table. Pokoj had also seen the victim store bills and envelopes containing larger amounts of cash inside a dresser that was located near the dining room.

Pokoj last saw the victim on her front porch on June 13, 2004, as he passed by her house. Pokoj waved at her, and she returned his greeting. Three days later, on June 16, 2004, Pokoj was

notified by Roger Janas, who provided lawn care for the victim, that he had unsuccessfully attempted to contact the victim by telephone and by knocking on her front door. Pokoj tried to reach the victim by telephone, but could not. He went to meet Janas at the victim's house. Pokoj knocked on the victim's front door when he arrived at her house; he noted that the screen door was locked and the inside front door was opened "to the safety latch." While Janas remained near the front of the house, Pokoj went to the back door and noticed that the screen door and the back door were opened slightly. Upon closer inspection, Pokoj determined that the chain door guard had been "snapped" off the doorframe. Pokoj opened the back door a "couple of feet" and called out the victim's name. When she did not respond, he exited the house and notified the Hamtramck Police Department.

At 11:10 a.m., Officer Edward Nolan and his partner, "Officer Cornwell," received a run to respond to the victim's residence for a "well being check." When they arrived, they met Pokoj and Janas and proceeded to the rear of the house. Nolan initially noted that the security chain on the back door had been "ripped" from the doorframe. Along with Cornwell and Pokoj, Nolan entered through the back door. Upon reaching the doorway of the bedroom off the kitchen, Nolan and Pokoj found the victim lying partially on the floor and partially on the bed in a pool of blood. Nolan noted that there were "three to four" puncture or stab wounds to her neck and that the victim had "maggots in her nose." The bed had been moved from the wall and appeared to be "broken." The three individuals then exited the house, and Nolan called for a detective to come to the scene. The police interviewed a neighbor of defendant, who reported that defendant had told her not to say where he was and had noticed defendant "spending money like a drunken sailor." During a search of defendant's home, executed pursuant to a warrant, the police discovered: (1) a pair of black Reebok athletic shoes; (2) proof of residency, i.e., bills and other items with defendant's name and address on them; (3) a red "Carhart" brand t-shirt; (4) a steel pry bar; (5) multiple knives; and (6) a screwdriver. Following a potential match between footprints found at the scene of the crime and defendant's shoe print and DNA testing, defendant was arrested and tried for murder.

Defendant first argues that the prosecutor failed to present sufficient evidence to support his conviction. To determine whether there was sufficient evidence to support a conviction, this Court reviews the evidence de novo, in the light most favorable to the prosecution, and decides whether any rational fact-finder could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

The elements of felony murder are that the defendant: (1) killed a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result, (i.e., with malice), (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in MCL 750.316(1)(b). *People v Nowack*, 462 Mich 392, 401; 614 NW2d 78 (2000), citing *People v Carines*, 460 Mich 750, 758-759; 597 NW2d 130 (1999). "A jury may infer malice from evidence that the defendant intentionally set in motion a force likely to cause death or great bodily harm." *Id*. Malice may also be inferred from the use of a deadly weapon. *Id*.

First-degree home invasion is among the enumerated felonies in MCL 750.316(1)(b). The elements of first-degree home invasion are: (1) the defendant broke and entered a dwelling

or entered the dwelling without permission; (2) that when the defendant did so, he intended to commit a felony, larceny, or assault, or he actually committed a felony, larceny, or assault while entering, being present in, or exiting the dwelling; and (3) the defendant was armed with a dangerous weapon where another person was lawfully present in the dwelling. MCL 750.110a(2); *People v Sands*, 261 Mich App 158, 162; 680 NW2d 500 (2004). "Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *People v Allen*, 201 Mich App 98, 100; 505 NW2d 869 (1993).

According to defendant, the prosecution failed to present sufficient evidence to establish his identity as the killer. The facts do not support defendant's claim in this regard. First, a review of the record shows that defendant was familiar with the victim. Pokoj, the victim's former neighbor, testified that he had seen defendant walking around the neighborhood and that defendant helped the victim with chores on "several occasions." Further, defendant's residence was only a short distance from the victim's house. Second, bloody footprints matching defendant's shoes were found inside the victim's residence. The record shows that: (1) a pair of size nine, Reebok athletic shoes was recovered from defendant's apartment the day after the victim's body was discovered and "test" impressions were taken; (2) eight bloody footprints were photographed at the victim's residence and overlaid with the "test" impressions of defendant's shoes; and (3) at least two of the impressions from the scene had "similar tread, size and wear characteristics" in comparison to the "test" impressions. Melinda Jackson, a forensic scientist, testified that the size nine, Reebok athletic shoes were "similar" and "could have originated the impressions" found in the victim's house. Moreover, Detective Michael Szymanski testified that the "Reebok" logo on the bottom of the shoes matched an impression found at the house. Third, the victim's blood and DNA were found on a t-shirt recovered from defendant's residence. DNA expert Heather Vitta testified that at 13 different locations, the victim's DNA profile matched, or was consistent with, the DNA profile found on the bloodstain on the t-shirt found at defendant's residence. The likelihood of a random match between the victim's DNA profile and the DNA profiles detected on the t-shirt amounted to one in 1.6 quintillion Caucasians. Fourth, bloodstains found on the t-shirt were consistent with the type of "splatter" that would be expected when the victim's carotid and jugular arteries were perforated. Finally, testimony of the medical examiner, Dr. Wayne Diaz, indicates that the victim had seven "triangular shaped" puncture wounds to her neck and chest area and that they were consistent with a wound inflicted by a knife. The record shows that several knives were recovered from defendant's residence. Viewing the foregoing evidence in a light most favorable to the prosecutor, we conclude that sufficient evidence was presented that a rational fact-finder could have found, beyond a reasonable doubt, that defendant killed the victim.

Defendant argues that because the case was based on circumstantial evidence, we must apply what he characterizes as the "*Davenport* rule." The rule, set forth in *People v Davenport*, 39 Mich App 252, 256; 197 NW2d 521 (1972), states that "where the people's case is based on circumstantial evidence[,] the prosecution has the burden of proving 'that there is no innocent theory possible which will, without violation of reason, accord with the facts.'" Defendant contends that, because the existence of an unidentified individual's DNA was found on defendant's red t-shirt, the prosecutor was required to affirmatively prove beyond a reasonable doubt that the unidentified third-party did not kill the victim. We reject this argument.

In *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998), this Court rejected the defendant's reliance on the "*Davenport* rule" and stated that "the prosecution need not negate every reasonable theory consistent with the defendant's innocence, but must only prove its own theory beyond a reasonable doubt in the face of whatever contradictory evidence the defendant may provide." See also *People v Carson*, 189 Mich App 268, 269; 471 NW2d 655 (1991) ("We agree with the long line of recent cases holding that it is unnecessary for the prosecutor to negate every reasonable theory consistent with the defendant's innocence.") Accordingly, we conclude that defendant's reliance on the "*Davenport* rule" is without merit.

Defendant also contends that there was insufficient evidence to support the conclusion that the killing took place during a first-degree home invasion. This argument does not comport with the record presented to us on appeal.

The record reveals that the victim's back door was opened and that the security chain to the back door had been "ripped" from the doorframe. This evidence, coupled with other evidence linking defendant to the crime, permits the inference that defendant broke into and entered the victim's home without permission. In addition, it can also be inferred from the evidence that a larceny occurred after the break-in and that the killing occurred during the commission of the home invasion. "Larceny is the taking and carrying away of the property of another, done with felonious intent and without the owner's consent." *People v Gimotty*, 216 Mich App 254, 257-258; 549 NW2d 39 (1996). The evidence presented at trial revealed that the victim normally kept money on top of her dining room table and inside a dresser and that, when the police searched the house, there was no money on top of the dining room table or inside the dresser. The victim's body was found in a bedroom located near the missing items and, according to Pokoj and Officer Nolan, it appeared that "a struggle" occurred inside the bedroom. Pokoj last saw the victim on June 13, 2004. Nolan testified that, based on his experience as a police officer, he believed the killing had occurred sometime "prior to" June 16, 2004. Finally, the evidence showed that the victim was lawfully in her home at the time of the break-in, and it can be inferred from the facts that the victim had puncture or stab wounds that were consistent with being inflicted by a knife and that multiple knives were recovered from defendant's home, that defendant was armed with a dangerous weapon when he was inside the victim's home. Hence, the evidence presented at trial reveals that the jury could logically infer that a larceny occurred after the break-in and that the killing occurred during the commission of the home invasion. Therefore, viewing the foregoing evidence in a light most favorable to the prosecutor, sufficient evidence was presented for the jury to conclude that the killing occurred during the commission of a first-degree home invasion.

Defendant next argues that the trial court erred in qualifying Jackson as an expert in footwear identification. However, the record shows that, after the prosecutor elicited Jackson's background and educational experience, defendant stipulated to her qualification as an expert in serology, forensic science and footwear identification. Defendant's stipulation regarding Jackson's qualifications effectively waives appellate review of the issue. *People v Carter*, 462 Mich 206, 214-215; 612 NW2d 144 (2000) (waiver is defined as "the intentional relinquishment or abandonment of a known right resulting in the extinguishment of any error relative to an alleged deprivation of the right"). Thus, any error was extinguished by defendant's stipulation. Regardless, our review of the record reveals that the trial court properly qualified Jackson as an expert in footwear identification.

Defendant next argues that the trial court erred when it qualified Jackson as an expert in blood spatter interpretation and allowed her to testify regarding the blood spatter found on defendant's t-shirt. We review the trial court's ruling regarding the admission of evidence for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

The purpose of expert testimony is to assist a jury to understand evidence or determine factual issues. MRE 702; *People v Smith*, 425 Mich 98, 106; 387 NW2d 814 (1986). MRE 702 provides as follows:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

In determining whether the testimony would aid the trier of fact, it is helpful to apply the "'common sense inquiry whether an untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment'" from experts. *Smith*, *supra* at 106, quoting Ladd, *Expert Testimony*, 5 Van L R 414, 418 (1952).

This Court has described the use of "blood stain" or "blood spatter" interpretation as follows:

> The geometric Blood Stain Interpretation is a method used to reconstruct the scene of the crime. Blood stains are uniform in character and conform to the laws of inertia, contrifugal [sic] force and physics. Study of the blood pattern along with its size and shape helps determine the source of the blood and any movement that might have occurred after the bloodshed began, including subsequent violent attacks upon the victim. [*People v Haywood*, 209 Mich App 217, 222; 530 NW2d 497 (1995), quoting *Farris v State*, 670 P 2d 995, 997 (Okla App 1983).]

In holding that the use of expert testimony regarding blood spatter interpretation was generally accepted by the scientific community, the *Haywood* Court noted that "it is a matter of common knowledge, readily understood by the jury, that blood will be expelled from the human body if it is hit with sufficient force and that inferences can be drawn from the manner in which the expelled blood lands upon other objects." *Haywood*, *supra* at 223-224.

In the present case, Jackson was clearly qualified by knowledge, experience, and training to testify regarding the bloodstains found on defendant's t-shirt. The record shows that Jackson, a forensic serologist, had a Bachelors of Science in Criminology with a major in Medical Technology and that she also received a year of training in serology, or the study of body fluids, with the Michigan State Police. Jackson had testified in over 300 different criminal cases. In approximately 12 of the cases, she was qualified as an expert and testified regarding blood spatter interpretation. Further, Jackson had approximately two weeks of beginner and advanced training in blood spatter interpretation and was certified by two outside agencies, including the

Biological Chemical Association. The general public would not know or be able to interpret the shape that blood spatter would make when it landed on t-shirt fabric. In light of the circumstantial evidence presented in the present case and the nature of the blood spatter patterns on the t-shirt, Jackson's testimony was helpful to the fact-finder in understanding the victim's manner of death. Therefore, we conclude that the trial court did not abuse its discretion when it qualified Jackson as an expert and permitted her to testify regarding her interpretation of the blood spatter on the t-shirt.

Defendant next argues that the prosecutor committed misconduct and denied him a fair trial when the prosecutor elicited inadmissible hearsay testimony from Szymanski regarding out-of-court statements made by a witness, Deborah Watkins. We conclude that, although the prosecutor improperly elicited the hearsay statements, defendant has not established that the error impacted the outcome of the proceedings in light of the other evidence presented.

Because defendant failed to preserve this issue below, our review is for plain error affecting defendant's substantial rights. *Carines*, *supra* at 763-764. To avoid forfeiture under the plain error rule, a defendant must show that: (1) there was an error; (2) the error was plain, i.e., clear or obvious; and (3) the error impacted substantial rights by affecting the outcome of the proceedings. Reversal is then warranted only if the error resulted in the conviction of an innocent defendant or seriously affected the fairness, integrity or public reputation of judicial proceedings. *Id.*; *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003).

The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Issues of prosecutorial misconduct are considered "on a case-by-case basis by examining the record and evaluating the remarks in context, and in light of defendant's arguments." *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004).

Here, a review of the challenged testimony reveals that the prosecutor elicited Szymanski's testimony regarding Watkins's statements on June 16, 2004, and June 17, 2004, for the truth of the matter asserted. Thus, Szymanski's testimony was hearsay pursuant to MRE 801(c) and, because it did not fall under any of the recognized exceptions, it was inadmissible. Because it was improper for the prosecutor to elicit the challenged testimony, defendant has established that plain error occurred. *Carines*, *supra* at 763-764. However, defendant has failed to establish that the error impacted his substantial rights by affecting the outcome of the proceedings. *Id*. The challenged testimony was relatively brief and a review of the record shows that the prosecutor did not reference Watkins's statements in her closing argument. Furthermore, in light of our analysis, *supra*, regarding the other evidence offered by the prosecutor, defendant has failed to show that Szymanski's testimony affected the outcome of his trial. Even if the prosecutor did not introduce the hearsay statements, substantial evidence existed for the fact-finder to convict defendant. Additionally, any undue prejudice could have been cured by a timely objection or a request for a curative instruction. See *People v Moorer*, 262 Mich App 64, 78-79; 683 NW2d 736 (2004). Thus, defendant's claim regarding this instance of prosecutorial misconduct does not warrant reversal on appeal.

Similarly, defendant's claim of ineffective assistance of counsel predicated on defense counsel's failure to object to the challenged testimony must also fail because defendant has failed to establish the requisite prejudice.

Because an evidentiary hearing was not conducted, this Court's review is limited to mistakes that are apparent from the lower court record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). This Court reviews a trial court's factual findings for clear error, and its constitutional determinations de novo. *Id*.

"Effective assistance of counsel is presumed, and the defendant bears a heavy burden to prove otherwise." *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). To establish a claim of ineffective assistance of counsel, a defendant must show "(1) that his trial counsel's performance fell below an objective standard of reasonableness and (2) that defendant was so prejudiced that he was denied a fair trial, i.e., that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *People v Walker*, 265 Mich App 530, 545; 697 NW2d 159 (2005), vacated in part on other grounds 720 NW2d 754 (2006).

Generally, defense counsel's decision whether to object to an alleged impropriety is a matter of trial strategy that this Court will not second-guess on appeal. See *People v Matuszak*, 263 Mich App 42, 61; 687 NW2d 342 (2004). Moreover, defendant has failed to establish a reasonable probability that the outcome of his trial would have been different had defense counsel objected to the challenged testimony. Because defendant was not prejudiced, and because defendant raises no other assertions of error by defense counsel, we conclude that defendant was not denied the effective assistance of counsel.

Finally, defendant argues that the prosecutor committed misconduct when he failed to produce Watkins, who was an endorsed witness, at trial. Defendant also contends that the trial court erred in determining that the prosecutor exercised due diligence in locating Watkins. This Court reviews de novo a claim of prosecutorial misconduct. *People v McGhee*, 268 Mich App 600, 630; 709 NW2d 595 (2005). Generally, this Court reviews a trial court's determination of due diligence and the appropriateness of a "missing witness" instruction for an abuse of discretion. *People v Eccles*, 260 Mich App 379, 389; 677 NW2d 76 (2004). However, unpreserved claims of error are reviewed for plain error affecting defendant's substantial rights. *Carines*, *supra* at 774.

Contrary to defendant's characterization, Watkins is not a res gestae witness. A res gestae witness is someone who witnessed some event in the continuum of the criminal transaction and whose testimony would aid in developing a full disclosure of the facts at trial. *People v Long*, 246 Mich App 582, 585; 633 NW2d 843 (2001). Here, the record indicates that Watkins did not arrive at the scene of the stabbing that formed the basis for defendant's conviction until after the crime had taken place.

Pursuant to MCL 767.40a, the prosecution "must notify a defendant of all *known* res gestae witnesses and all witnesses that the prosecution *intends to produce*" and is under an "obligation to provide notice of *known witnesses* and *reasonable assistance* to locate witnesses *on defendant's request.*" *People v Cook*, 266 Mich App 290, 295; 702 NW2d 613 (2005), quoting *People v Burwick*, 450 Mich 281, 287; 537 NW2d 813 (1995) (emphasis in original). Under MCL 767.40a(3), a prosecutor who endorses a witness is obliged to exercise due diligence to produce that witness at trial. *Eccles*, *supra* at 388. MCL 767.40a(4) provides that "[t]he

prosecuting attorney may add or delete from the list of witnesses he or she intends to call at trial at any time upon leave of the court and for good cause shown or by stipulation of the parties." The failure to produce an endorsed witness may be excused if the prosecutor can show that the witness could not be produced despite the exercise of due diligence. *People v Canales*, 243 Mich App 571, 577; 624 NW2d 439 (2000). The test for due diligence "is one of reasonableness and depends upon the facts and circumstances of each case, i.e., whether diligent good-faith efforts were made to procure the testimony, not whether more stringent efforts would have produced it." *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998).

Here, although defendant did not request a due diligence hearing, the testimony at trial elicited by the prosecutor was sufficient to show that reasonable efforts were made to procure Watkins's presence at trial. Szymanski outlined his attempts to locate Watkins before the preliminary examination and trial, including: (1) attempting to locate her at her known address; (2) conducting a "LEIN" search, which revealed a "new address;" (3) issuing a subpoena for her attendance at both the preliminary examination and trial; (4) attempting to locate her at the "new address," which was an "abandoned building;" and (5) questioning her neighbors at the known address regarding her location. Moreover, the record reveals that Watkins may have been deceased before defendant's preliminary examination. Thus, we conclude that the trial court properly found that the prosecutor exercised due diligence in locating Watkins for trial. Further, the prosecutor's actions did not deny defendant a fair trial.

Defendant also contends that the trial court erred in not giving a missing witness instruction regarding Watkins's testimony. The missing witness jury instruction allows the jury to infer that a missing witness's testimony would have been unfavorable to the prosecution's case. CJI2d 5.12. "[I]n every instance, the propriety of reading CJI2d 5.12 [the missing witness instruction] will depend on the specific facts of [a] case." *People v Perez*, 469 Mich 415, 420-421; 670 NW2d 655 (2003). However, because the trial court properly found that the prosecutor exercised due diligence in locating Watkins, the missing witness jury instruction was not required. *Eccles*, *supra* at 388-389.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Kirsten Frank Kelly
/s/ Stephen L. Borrello